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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059220
Party	Defendant Stockmarket Burger Inc.
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Attachments	Reply in Support of Respondent's Motion to Dismiss.pdf(108366 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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RED BULL GMBH,)	
)	Cancellation No. 92059220
Petitioner,)	Registration No: 4481899
)	Mark: STOCKMARKET (& Design)
v.)	
)	
STOCKMARKET BURGER, INC.,)	
)	
)	
Respondent.)	
)	
)	
)	

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Petitioner, Red Bull GmbH ("Petitioner") is a vexatious litigant and a serial filer of patently frivolous oppositions and cancellations. A cursory review of the TTABVue database shows that Petitioner has filed countless frivolous complaints pleading its "RED BULL" mark as a basis for opposition to objectively dissimilar marks such as OLD OX, TORO BRAVIO, EL TORO MENSWEAR, MONTORO, BULBASH, and D'TOR TERRITORY among others, for various goods and/or services. Some of the opposed marks contained images of bulls or other bovine animals (but none similar to Opposer's bulls), but no other similarities.

This cancellation action is likewise frivolous: Petitioner has pleaded its RED BULL marks as a basis for cancellation of Respondent, STOCKMARKET BURGER, INC.'s ("Respondent") federal registration of STOCKMARKET (& Bull/swirl design) for restaurant services. However, the *mere* fact that Respondent's mark contains a bull design (which is completely different from

Petitioner's bulls) is hardly sufficient to state a plausible claim for relief. This is especially true where Respondent's mark prominently features the word STOCKMARKET, connoting the U.S. equity market, while Petitioner's mark does not. The marks are so utterly dissimilar that a likelihood of confusion is implausible. TMBP § 503.02; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss"). Accordingly, the Board should grant Respondent's Rule 12(b) motion to dismiss the petition with prejudice.

Petitioner has not even *attempted* to defend the frivolous allegations in its complaint, choosing instead to *simply ignore* Respondent's arguments in its motion ("this response does not consider or give merit to [Respondent's arguments]"). Opposition at 4. Thus, in its opposition brief, Petitioner does not argue that the allegations in the petition are plausible. In fact, Petitioner's brief does not contain a single argument referencing the similarity or dissimilarity of the marks. By expressly refusing to address the dissimilarity of the marks or the implausibility of its claim, Petitioner has conceded the merits of the motion. On this basis alone, the Board should grant Respondent's motion and dismiss the petition.

Instead of addressing the merits of the motion, Petitioner's brief includes a litany of bizarre arguments and requests, including:

- "Respondent's Motion to Dismiss is a spurious attempt to once again delay the cancellation proceedings". Opposition at 1. However, Respondent's 12(b) motion clearly seeks dismissal of the petition and termination of the proceeding, not delay.

- That Respondent's Rule 12(b) Motion to Dismiss is "inaccurately captioned" as a Rule 12(b) Motion to Dismiss. *Id.* at 2. This argument does not make any sense. Respondent's Rule 12(b) motion is correctly captioned as a Rule 12(b) motion.
- That Respondent's Motion "shirks Respondent's clear mandate to answer the Petition for Cancellation". *Id.* at 3. Petitioner incorrectly interprets the Board's September 16, 2014 order directing Respondent to file an "answer" as one *prohibiting* Respondent from filing a Rule 12(b) motion in lieu of an answer. The Board routinely assigns the "Time to Answer" in the scheduling order of each proceeding, and there is no question that the term "answer" in the Board's order likewise refers to the deadline for Respondent to file an answer *or other responsive pleading*, including a Rule 12(b) motion. This is the *only* reasonable interpretation, as Rule 12(b) clearly permits the filing of a motion to dismiss in lieu of an answer.
- That a motion to dismiss is somehow "improper" where the petition includes vague allegations of ownership of numerous, unspecified "bull design marks" *which are not depicted anywhere in the pleadings*. Opposition at 2. However, a claim of likelihood of confusion **based on unpled marks** simply cannot survive a motion to dismiss.
- A request for "leave to amend the Petition for Cancellation". *Id.* at 3. However, Petitioner deliberately chose to avoid properly pleading its marks—even after Respondent raised the **same** challenge to the identical, vague language pleaded in consolidated Opposition No. 91214537. Petitioner was well aware that its vague allegations of unspecified "bull design

marks" were severely deficient, but deliberately included them in its complaint to promote additional motion practice and to delay this proceeding.¹

Perhaps the most bizarre is Petitioner's argument that the 12(b) motion is intended to "surreptitiously evade clear rules and long-standing precedent to prematurely have the Board issue a judgment on the merits". Opposition at 3. Petitioner utterly fails to cite a single example of this "long-standing precedent" against dismissal of frivolous complaints.

On the contrary, Petitioner is well aware that the Board (like the courts) may dismiss a complaint that fails to state a claim that is plausible on its face; TMBP § 503.02; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009); and that the Board may dismiss an opposition where the marks are simply too dissimilar to cause a likelihood of confusion. *See Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS; single du Pont factor of dissimilarity of marks outweighed all others such that other factors, even if decided in nonmovant's favor, would not be material because they would not change the result); *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) (court affirms Board); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed.

¹ Petitioner recommends additional motion practice to delay the proceedings:

If Respondent found the descriptions of Red Bull's common law designs to be vague, the proper vehicle to challenge these descriptions was through a Motion for a More Definite Statement rather than a Motion to Dismiss.

Opposition at 2.

Cir. 1989)(court affirms Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES). *See also Missiontrek Ltd. Co. v. Onfolio, Inc.*, 80 USPQ2d 1381 (TTAB 2005) (dissimilarity of the marks ONFOLIO and design and CARTAGIO dispositive); *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive).

In fact, in *Red Bull GmbH v. Jean Pierre Biane* (Opposition No. 91210860), the Board recently granted a Rule 12(c) motion for judgment on the pleadings dismissing one of Petitioner's other frivolous oppositions, finding that

[e]ven if opposer were to show that its mark is famous, and even if all the other *du Pont* factors were to be considered in opposer's favor, including the similarity of the goods, channels of trade and classes of consumers, **the marks in this case are simply too dissimilar to support a finding of likelihood of confusion.**

Id., TTABVue Dkt. No. #14, at 7-8 (emphasis added). Similarly here, the Board should dismiss the petition for cancellation with prejudice because the marks are simply too dissimilar to support a plausible claim of likelihood of confusion. Last, because the marks are too dissimilar, and because Petitioner's standing rests entirely on its implausible allegation of likelihood of confusion, Petitioner's remaining claims of "non-use" and "false declaration" should be dismissed for lack of standing.

Conclusion

Based on the foregoing, Respondent's Motion to Dismiss should be granted, and Petitioner's claims should be dismissed with prejudice.

Date: November 20, 2014

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS** has been served on Martin R. Greenstein, counsel for Petitioner, on November 20, 2014 via First Class U.S. Mail, postage prepaid to:

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